Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

DANIEL ANDERSEN and LORENZO J. LAMANTIA, individually and on behalf of the members of the Institute of Global Prosperity,

Petitioners,

v.

UNITED STATES OF AMERICA and NAMED and UNNAMED AGENTS of the INTERNAL REVENUE SERVICE CRIMINAL DIVISION, et al.

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether DiBella v. United States, 369 U.S. 121 (1962), deprived the court of appeals of jurisdiction of an appeal from the denial of petitioners' Fed. R. Crim. P. 41(e) motion merely because of the existence of an ongoing grand jury investigation of petitioners. Four circuits have held that the existence of a grand jury investigation does not bar an appeal, while seven circuits have held that it does.

2. Whether there is an exception to the nonappealability of Rule 41(e) motions where government seizures of material constitute serious, imminent and irreparable violations of First Amendment rights.

3. Whether the petitioners' motion for a preliminary injunction to enjoin the government from seizing, using or disseminating Institute of Global Prosperity membership information was, in form or substance, a Rule 41(e) motion for return of property.

4. Whether the circuit court, having found that it lacked jurisdiction over the individual claims of petitioners Andersen and LaMantia, nonetheless had jurisdiction over petitioners' representative claims on behalf of the more than 70,000 members of the Institute of Global Prosperity that their First Amendment rights to associational anonymity were being violated.

PARTIES TO THE PROCEEDING

DANIEL ANDERSEN and LORENZO J. LAMANTIA, individually and on behalf of the members of the Institute of Global Prosperity,

Petitioners,

v.

UNITED STATES OF AMERICA, NAMED and UNNAMED AGENTS of the INTERNAL REVENUE SERVICE CRIMINAL DIVISION, IRS Special Agent THOMAS WOURGIOTIS, IRS Special Agent TOM OENBRINK, IRS Special Agent PAULA LURVEY, IRS Special Agent JEFFREY HOLM, IRS Special Agent JULIE LAU, IRS Special Agent CHARLES PHILLIPS, IRS Special Agent JUDY O'BRIANT and SHOSHANNA SZUCH,

Respondents.

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PETITION FOR WRIT OF CERTIORARI

The petitioners, Daniel Andersen and Lorenzo J. LaMantia, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above proceeding on July 30, 2002.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-15a) is reported at 298 F.3d 804. The opinion of the district court (App., *infra*, 16a-21a) is unreported.

JURISDICTION

The opinion of the court of appeals was entered on July 30, 2002. A timely petition for rehearing or rehearing en banc was denied on October 10, 2002. App., *infra*, 23a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment to the United States Constitution, which provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

This case involves the Fourth Amendment to the United States Constitution, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or

affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

This case involves Rule 41(e) of the Federal Rules of Criminal Procedure (1989), which provides:

> Motion for Return of Property. A person aggrieved by an unlawful search and seizure or by the deprivation of property may move the district court for the district in which the property was seized for the return of the property on the ground that such person is entitled to lawful possession of the property. The court shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted, the property shall be returned to the movant, although reasonable conditions may be imposed to protect access and use of the property in subsequent proceedings. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

STATEMENT OF THE CASE

On September 28, 2001, a Verified Complaint for Bivens Damages and Injunctive Relief was filed in the United States District Court for the Central District of California by the petitioners, two of the founders of the Institute of Global Prosperity (hereinafter "IGP"), a voluntary association of individuals who engage in the dissemination of educational, political, religious and philosophical ideas and materials, some

of which are critical of the monetary and tax policies of the United States government. Petitioners sought, on their own behalf and on behalf of the members of the IGP, to enjoin agents of the Internal Revenue Service from seizing and/or using information relating to the identities of the 70,000 or more members of IGP in the absence of any showing of a compelling governmental need for such identifying information. The relief sought by petitioners was narrowly limited to preventing the compelled disclosure of IGP membership lists, and in no way sought to interfere with any ongoing investigation of whether petitioners or others had violated the tax laws.

Petitioners are the subjects of a federal criminal investigation into whether they have "conspired to commit tax offenses and/or defraud the Internal Revenue Service, committed or attempted to commit tax evasion, failure to file tax returns and interference with the administration of the Internal Revenue laws."[1] Even though there has been a grand jury investigation in progress since at least February, 2001, no indictments have been returned or criminal charges filed against petitioners.[2]

On February 28, 2001, on the basis of sealed affidavits which the district court refused to disclose to petitioners, the government executed search warrants at petitioners' personal residences in California which authorized the seizure of

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[1] Certified Record before the court of appeals (hereinafter referred to as CR) 13, Opposition of Defendants to Plaintiffs' Motion for Preliminary injunction at 3.

[2] Id. at 4. Thus, the term of at least one grand jury has expired (unless extended by the court) without the return of indictments. See Fed. R. Crim. P. 6(g).

"evidence, fruits, or other instrumentalities" of the specified tax crimes for which petitioners were being investigated.[3] In addition to authorizing the seizure of documents relating to the personal and business activities of petitioners and IGP, the warrants authorized the seizure of membership lists and other documents which identify more than 70,000 people who are members, prospective members, or persons associated with IGP.[4] In the proceedings to date, the government has not even contended that any of these persons have committed tax crimes or that information as to their identities will produce evidence of the commission of tax offenses by petitioners or anyone else. Pursuant to these warrants, the government has seized thousands of pages of documents, the only purpose of which has been to identify persons associated with IGP.[5]

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[3] CR 1, Excerpts of the Record in the court of appeals (hereinafter ER) 1, Verified Complaint, Exhibits 1(a), 2(a). On the same date and at various other dates up to and including September 25, 2001, the government executed search warrants at other locations connected to IGP in Florida, Massachusetts and Washington. Id. Exhibits 3(a), 4(a), 5, 6(a), 8(a) and 9(a).

[4] The warrant for petitioner Andersen's residence authorized the seizure of "applications for membership, membership cards . . lists of or names or addresses or telephone numbers (or other identifying data) of members, prospective members . . ." of IGP (id. Exhibit 1(a) ¶18) and "address books, business cards, listing of telephone numbers . . . rolodex indices, and contact lists for Global members, prospective members, Global leaders . . . ."(id. Exhibit 1(a) ¶23). The warrants for the other locations at which warrants were executed contained identical language.

[5] Defendants also seized, without specific authorization in the warrants, certain written material which they describe as "anti-tax literature" from the residence of petitioner Andersen, and books and literature from the home of petitioner LaMantia. See CR 1, ER 1, Exhibit 2(b), p. 54; Exhibit 3(b), p. 75.

These seizures of evidence of membership and prospective membership in IGP have had a substantial chilling effect upon the exercise by IGP members of their First Amendment rights of association and speech. In uncontroverted declarations submitted in support of petitioners' motion for preliminary injunction, one IGP salesperson reported that many people with whom he deals are "no longer willing to be associated with IGP" because of the IRS raids, and that many are not purchasing IGP materials or attending seminars because they "are afraid of coming to the attention of the IRS and subjecting themselves to an audit or other IRS scrutiny."[6] Another reported that in his discussions with sales prospects "[t]he average person is very afraid of their name appearing on a list that is seized by the IRS and worried about being a target of the IRS . . ."[7] And the office manager for an entity that markets educational products for IGP, reported that sales of audiotapes and seminar tickets had declined precipitously as information of the IRS raids had spread.[8]

In their motion for a preliminary injunction, petitioners asked the district court to enjoin the defendants from conducting further seizures of IGP membership information and from using or disseminating any of the membership information seized *pendente lite*. On October 22, 2001, the district court denied the motion on the ground that "the alleged infringement of First Amendment rights alleged by plaintiffs appears to be outweighed by the government's

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[6] CR 19, Declaration of Manuel Medina, ¶6, ER 5.

[7] CR 19, Declaration of Eron Lonnie Brasher, III, ¶4, ER 6.

[8] CR 6, Declaration of Becky L. Coggins, ¶¶10-15, ER 160.

compelling interest in pursuing criminal investigations against persons who unlawfully failed to pay taxes."

Petitioners appealed to the United States Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. § 1292(a)(1), and moved for an injunction pending appeal pursuant to F.R.A.P. 8(a)(1)(C), which the district court denied on November 7, 2001. The court of appeals denied petitioners' Emergency Motion under Circuit Rule 27-3 for an injunction pending appeal on November 15, 2001, on the ground that petitioners "fail to demonstrate they are entitled to the relief sought."

On July 30, 2002, over the dissent of Judge Stephen Reinhardt, the court of appeals dismissed the appeal for lack of jurisdiction on the ground that petitioners' motion for preliminary injunction was, in substance, a motion under Fed. R. Crim. P. 41(e) which was not appealable because of the existence of an ongoing grand jury investigation. On October 10, 2002 petitioners' Petition for Rehearing or Rehearing En Banc was denied.

REASONS FOR GRANTING THE WRIT

I. The Circuits Are Divided Over Whether the Existence of a Grand Jury Proceeding Renders A Federal Rule of Criminal Procedure 41(e) Motion Nonappealable.

A. This Case Squarely Presents the Conflict.

In DiBella v. United States, 369 U.S. 121 (1962), two criminal defendants, subsequent to their arrest, filed motions under Fed. R. Crim. P. 41(e), seeking the return of property that had been seized from them and to suppress the property as evidence. While the motions were pending, each defendant

was indicted. This Court held that the district court orders denying the Rule 41 motions were interlocutory and hence not appealable, explaining that to permit such interlocutory appeals of a suppression motion would disrupt the ongoing criminal prosecution. The Court held that the appellate courts have jurisdiction to review decisions on Rule 41(e) motions "only if the motion is solely for return of property and is in no way tied to a criminal prosecution *in esse* against the movant." DiBella, 369 U.S. at 131-32 .

The courts of appeals have differed sharply on when a criminal prosecution is *in esse* against the movant, giving rise to uncertainty, a lack of uniformity, and injustice in this area of litigation. The Sixth, Seventh, Eighth and Tenth Circuits have interpreted DiBella to mean that a grand jury investigation, while a criminal proceeding, is not a criminal prosecution for Rule 41(e) purposes until the movant has been arrested, charged or indicted. These circuits thereby allow Rule 41(e) motions to be appealed while a grand jury investigation is in progress. See Sovereign News Co., v. United States, 690 F.2d 569, 571 (6th Cir. 1982), cert. denied, 464 U.S. 814 (1983) ("The government contends that since a grand jury allegedly has been empanelled to hear the results of the tax investigation, we must apply the DiBella rule ... We disagree. ... we find that the mere possibility of a prosecution is too remote 'to deprive the district court's order of finality.' "); Mr. Lucky Messenger Serv., Inc. v. United States, 587 F.2d 15,16 (7th Cir. 1978); In re Grand Jury Proceedings, 716 F. 2d 493, 496 (8th Cir. 1983); Blinder, Robinson & Co. v. United States, 897 F.2d 1549, 1554 (10th Cir. 1990); First National Bank of Tulsa v. United States Department of Justice, 865 F.2d 217 (10th Cir. 1989); Voss v. Bergsgaard, 774 F.2d 402, 403-404 (10th Cir. 1985) (government may appeal the granting of a Rule 41(e) motion while an investigation by the IRS was pending). As the Seventh Circuit has held: "The motion for return of property is not one

tied to a criminal prosecution *in esse* against the movant until the criminal process shifts from the investigatory phase to the accusatory." Mr. Lucky Messenger Service, Inc. v. United States, 587 F.2d at 16.

The First, Second, Third, Fourth, Fifth, Ninth, and Eleventh Circuits, however, have broadly construed DiBella to mean that the mere existence of a grand jury investigation renders a Rule 41(e) motion nonappealable. See Imperial Distributors, Inc. v. United States, 617 F.2d 892, 896 (1st Cir. 1980), cert. denied 449 U.S. 891 (1980); Church of St. Matthew v. United States, 845 F.2d 418, 419 (2nd Cir. 1988); United States v. Furina, 707 F.2d 82, 84 (3d Cir. 1983); United States v. Regional Consulting Serv., 766 F.2d 870 (4th Cir. 1984); Sealed Appellant 1 and Sealed Appellant 2 v. Sealed Appellee, 199 F.3d 276, 278 (5th Cir. 2000); and In re Grand Jury Proceedings, 831 F.2d 222, 224 (11th Cir. 1987).

The sharp split among the circuits has been recognized by the federal judiciary. Dissenting In the present case, Judge Stephen Reinhardt, noted the disagreement among the circuits. App. 13a, n.1. And the Fourth Circuit explicitly recognized that:

> In applying DiBella, the Circuit Courts of Appeals have split on the question of whether a grand jury investigation, without more, constitutes a criminal proceeding *in esse* sufficient to render the denial of a motion for return of property nonappealable within the meaning of 28 U.S.C. § 1291. The Sixth, Seventh, Eighth, and Tenth Circuits have held that a motion for return of property is appealable even if a grand jury investigation is in place . . . .The First, Second, Third, Fifth and Ninth

Circuits have held the contrary.

United States v. Regional Consulting Serv., 766 F.2d 870, 872-873 (4th Cir. 1984).

This Court should grant certiorari and resolve the conflict by adopting the position of the Sixth, Seventh, Eighth, and Tenth Circuits that, for the purpose of DiBella, a criminal prosecution does not commence until a person has been arrested, charged or indicted, and the existence of a grand jury investigation does not bar an appeal of a Rule 41(e) motion. As the court explained in Blinder, Robinson & Co. v. United States, 897 F.2d 1549, 1555 (10th Cir. 1990):

> The bright line rule of indictment or arrest ... is preferable to that followed by several of the other circuits. Because a grand jury investigation is secretive in nature, knowledge of its existence depends on government disclosures in a way that knowledge of an arrest or indictment does not. Further, the risk that an appeal of a Rule 41(e) ruling would interfere with an ongoing criminal prosecution, which was the foundation of the DiBella holding, is more speculative during a grand jury investigation than when an indictment has been filed or an arrest has occurred.

B. The Issues Presented by the Conflict are Recurring and of Great Practical Importance.

This petition presents precisely the sort of case in which this Court has granted certiorari in the past so as to provide for uniformity among the circuits. See, e.g., Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 373 (1981) (certiorari

granted "to resolve a conflict among the Circuits on the appealability question" of an interlocutory order disqualifying counsel); Weisgram v. Marley Co., 528 U.S. 440, 446 (2000) (certiorari granted because "[c]ourts of appeals have divided on the question" of the authority of an appellate court to direct entry of judgment as a matter of law); United States v. Balsys, 524 U.S. 666, 671 (1998) (certiorari granted "to resolve a conflict among the Circuits" on whether the Fifth Amendment privilege against self-incrimination may be invoked based on fear of prosecution by a foreign nation); McElroy v. United States, 455 U.S. 642, 643 (1982) (certiorari granted because of "a conflict among the Circuits on the issue of statutory construction"); Marks v. United States, 430 U.S. 188, 189 (1977) (certiorari granted "to resolve a conflict in the Circuits"). In Firestone Tire & Rubber Co v. Risjord, supra, the conflict, like that present here, concerned appealability, the conflict was of long-standing duration, and involved many circuits, with six circuits holding that disqualification of counsel orders were not appealable and five circuits permitting such appeals. Id., at 372, n. 10.

This case is further of great practical importance because it involves the First Amendment rights of more than 70,000 persons residing throughout the United States, whose claims were not heard on appeal simply because of the residency of the two named petitioners. For these persons, "[t]he loss of First Amendment freedoms for even short periods of time, unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 373-374 (1976).

II. The Limitation on the Appealability of Rule 41(e) Motions is Inapplicable Where There Are Serious, Imminent and Irreparable Violations of First Amendment Rights.

Although DiBella v. United States, 369 U.S. 121 (1962), stands for the proposition that a Rule 41(e) motion for the return of unlawfully seized property is generally not appealable if it is tied to a criminal prosecution against the movant, that rule is inapplicable where, as in the present case, the denial of appellate review will have a serious chilling effect upon First Amendment rights of speech and association. As Judge Reinhardt cogently argued in his dissent below, "the First Amendment right to association is one of those questions of exceptional importance that must be resolved as soon as possible, without waiting for the end of what may be interminable criminal proceedings." App. 13a.

The stated purpose of the DiBella rule is to avoid interference with ongoing criminal cases, and to discourage piecemeal litigation and delays in the administration of justice. DiBella, 369 U.S. at 124. In DiBella, pre-indictment motions in ongoing drug and robbery cases were filed for the suppression and return of property, including drugs, equipment and a gun, allegedly seized in violation of the Fourth Amendment. This Court held that because Fourth Amendment questions arise regularly in criminal trials and because their resolution may determine the outcome of the criminal matter, they represent "but a step in the criminal case" and should ordinarily be resolved in the course of the criminal proceeding. DiBella, 369 U.S. at 131-132. In DeMassa v. Nunez, 747 F.2d 1283 (9th Cir. 1984) (DeMassa I), the Ninth Circuit extended DiBella to a collateral civil action for injunctive relief requiring the return of property that was allegedly seized in violation of the Fourth Amendment pursuant to a search warrant prior to the institution

of any criminal charges. The Ninth Circuit held that the motion for the return of property was the functional equivalent of a motion to suppress evidence, and its denial constituted an interlocutory order which was not appealable under DiBella. DeMassa I, 747 F.2d at 1286.

Significantly, the Ninth Circuit recognized that "when a motion for return of property is independent of a criminal prosecution, a trial court's denial of the motion is subject to immediate appeal because the absence of a related prosecution would render review of the lower court's order impossible." DeMassa I, 747 F.2d at 1286. In determining whether the motion is truly independent of an underlying criminal action, "courts look to the twin tests of DiBella, i.e., whether the motion is solely for the return of property and whether the motion is in no way related to a criminal prosecution against the movant." Id.

In the present case, petitioners' motion for preliminary injunction is "truly independent" of any potential criminal action against them under these criteria. Petitioners did not seek the return of any property in their motion that was in any way related to the government's investigation of them for tax crimes. The membership lists seized had no relevance whatsoever to their guilt of any possible tax offenses and, even if lawfully seized, would not have been admissible against them at trial. To the extent that the motion is construed as seeking the return of the IGP membership lists seized in the searches, it is also clear that the motion was in no way tied to any criminal prosecution. The motion sought to protect the IGP membership from the compelled disclosure of their identities in violation of their First Amendment rights of association and speech under the long established principle of NAACP v. Alabama, 357 U.S. 449 (1958). It did not seek to suppress such lists as evidence in connection with any criminal proceedings

against IGP or its membership, as indeed there has been no suggestion by the government that there is any such proceeding in existence.

More fundamentally, as Judge Reinhardt pointed out in his dissent, DiBella and DeMassa I "do not set forth an absolute rule prohibiting all interlocutory appeals in cases involving criminal proceedings." App. 12a.. So as not to frustrate the right of appellate review, "immediate appeal has been allowed from an order recognized as collateral to the principal litigation ...when the practical effect of the order will be irreparable by any subsequent appeal." Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1947). Exceptions to the finality rule recognize "a general public policy permitting interlocutory appeals in criminal cases where rights of exceptional importance are at stake, and where resolution of these rights cannot wait until the close of criminal proceedings." Id. See e.g., Helstoski v. Meanor, 442 U.S. 500 (1977) (permitting immediate appeal of criminal defendant's motion to dismiss under the Speech and Debate Clause); Abney v. United States, 431 U.S. 651 (1977) (permitting immediate appeal of criminal defendant's motion to dismiss on double jeopardy grounds); Stack v. Boyle, 342 U.S. 1 (1951) (permitting immediate appeal of criminal defendant's motion to reduce bail); See also Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 55 (1992) ("Adjudicating the proper scope of First Amendment protections has often been recognized by this Court as a 'federal policy' that merits an exception to the general finality rule."); United States v. P.H.E., Inc., 965 F.2d 848, 857 (10th Cir. 1992) ("[F]ederal courts have asserted jurisdiction in a number of contexts involving non-final orders, in which the proceedings complained of infringed upon First Amendment rights.").

The case for the exercise of appellate jurisdiction under the circumstances here is compelling. As the Supreme Court has stated, the ability of the members of an association to remain anonymous "is a shield from the tyranny of the majority ...[and] exemplifies the purpose behind the Bill of Rights and the First Amendment in particular: to protect unpopular individuals from retaliation – and their ideas from suppression - at the hand of an intolerant society." McIntyre v. Ohio Election Commission, 514 U.S. 334, 337 (1995); see also Watchtower Bible and Tract Society of New York, Inc., v. Village of Stratton, 536 U.S.150 (2002). Yet, in the present case, the district court and the circuit court denied any relief on behalf of the tens of thousands of IGP members and prospective members whose rights to anonymity have been violated by the government's seizure of their membership information. Unless this Court intervenes they will never have any remedy since the violation of these third parties' rights cannot be vindicated in any eventual criminal prosecution of petitioners. An immediate appeal is necessary because "the loss of First Amendment freedoms, for even short periods of time, unquestionably constitutes irreparable injury ..." San Diego Committee v. Governing Board, 790 F.2d 1471, 1473 n.3 (9th Cir. 1986) (quoting from Elrod v. Burns, 427 U.S. 347, 3;73-374 (1976)). As Judge Reinhardt concluded, "the importance of this claim [that the First Amendment rights of IGP membership are being chilled by the government's possession of IGP's membership lists] - and the need to resolve it expeditiously – outweighs any theoretical disruption to the grand jury proceedings that may be occasioned by an immediate appeal." App. 15a.

III. The Decision Below Is Incorrect.

A. Petitioners' Motion For Preliminary Injunction Was Not, In Form Or Substance, A Rule 41(e) Motion For Return of Property

In its holding that the Ninth Circuit has no appellate jurisdiction, the court below went to extraordinary lengths to avoid confronting an issue of fundamental constitutional importance. By construing petitioners' motion for preliminary injunction, filed in the context of a civil action for damages and injunctive relief, as a motion under Rule 41(e) of the Federal Rules of Criminal Procedure for the return of property, the court dismissed the appeal on the basis of an argument that was raised for the first time, as an apparent afterthought, in the government's brief on the merits in the Ninth Circuit, and which had not been raised or considered previously by any of the parties, by the district court, or by a motions panel of the Ninth Circuit.

The reason that Rule 41(e) had not even been hinted at prior to the government's brief on appeal is that it was clear to the parties and the courts that petitioners were not seeking relief typically provided by Rule 41(e). Rule 41(e) provides a procedure for a person aggrieved by an unlawful search and seizure to obtain the return of property unlawfully seized. In the present case, however, petitioners' motion for preliminary injunction does not seek the return to petitioners of any property seized in the course of the searches of their residences and other locations. On the contrary, petitioners only sought to preliminarily enjoin the defendants from conducting any further seizures of IGP membership information and from using or disseminating any such information pendente lite.

Furthermore, although a Rule 41(e) motion may also function as a motion to suppress evidence in pending or future criminal prosecutions, petitioners did not seek any such relief in their motion for preliminary injunction, and the court's assertion that petitioners asked "for exclusion of evidence" is completely without foundation. App. 6a. Rather, petitioners only sought to protect the First Amendment rights to associational anonymity of IGP members and prospective members, on whose behalf they were acting, by enjoining the use or dissemination by the government of the membership data seized. This information was of no evidentiary value in the government's ongoing investigation of petitioners, and would be completely irrelevant in any future prosecution of petitioners for specific tax crimes.

In view of the fact that petitioners' motion for preliminary injunction was not, in form or substance, a Rule 41(e) motion, the Ninth Circuit had appellate jurisdiction over the denial of the motion pursuant to 28 U.S.C. § 1292(a)(1), and the invocation of DiBella v. United States, 369 U.S. 121 (1962), by the court as the basis for dismissing the appeal was without merit.

B. The Ninth Circuit Erred In Holding That It Had No Jurisdiction Over the First Amendment Claims of the More than 70,000 IGP Members.

Even if petitioners' motion for preliminary injunction were treated as a Rule 41(e) motion, the Ninth Circuit nonetheless had jurisdiction over the claims of the IGP members to enjoin the dissemination of their identities on the authority of DeMassa v. Nunez, 770 F.2d 1505 (9th Cir. 1985) (per curiam) (DeMassa II). Although the Ninth Circuit held that it was without jurisdiction under DiBella v. United States, supra, to consider an appeal of the denial by the district court of

injunctive relief requiring the return to the plaintiff lawyer, who was the subject of a grand jury investigation, of documents and property seized in a raid of his law office, the court did recognize that clients of the lawyer, "who are strangers to any potential indictments," may appeal from the denial of relief by the district court with respect to the violations of their Fourth Amendment rights by the seizure of their files. DeMassa II, 770 F. 2d at 1506.

In the present case, the members of IGP are in essentially the same position as the clients in DeMassa II, and are equally entitled to vindicate on appeal their personal First Amendment rights, separate and apart from the rights of petitioners Andersen and LaMantia. They, too, are "strangers to any potential indictments," and since they are not the subject of any criminal proceedings the relief sought would in no way compromise any legitimate government investigation.

The court below, however, distinguished DeMassa II on the ground that there the clients were named plaintiffs in the action, whereas in the present case no individual IGP members are named as plaintiffs. Without any reasoned explanation or the citation of authority, the court concluded that "we cannot assert jurisdiction over the membership's potential *derivative* claims, even if Andersen and LaMantia otherwise would be entitled to bring such claims in a representative capacity." App. 6a, n.4.

The claims of IGP members are not "derivative" in the sense that they depend for their existence upon the individual claims of petitioners. Rather, these claims arise from the government's direct violation of IGP members' First Amendment rights, and petitioners have standing to assert these rights on their behalf. Since petitioners Andersen and LaMantia brought this action in dual capacities, there is no reason that

they cannot appeal the denial of relief by the district court in their representative capacities on behalf of IGP members, even if they cannot appeal in their individual capacities. This Court has recognized "the right of litigants to bring actions on behalf of third parties, provided three important criteria are satisfied: the litigant must have suffered an injury-in-fact,' thus giving him or her a 'sufficiently concrete interest' in the outcome of the issue in dispute; the litigant must have a close relation to the third party; and there must exist some hindrance to the third party's ability to protect his or her own interested." Powers v. Ohio, 499 U.S. 400, 411 (1991) (internal citations omitted)).

Petitioners satisfied each of the Powers criteria and, as the district court found, "have standing to assert constitutional claims on behalf of members of the IGP". App. 6a. The court below exalted form over substance when it held that it was without jurisdiction to consider an appeal by petitioners in their representative capacity merely because it was without jurisdiction of an appeal in their individual capacity. Indeed, to require IGP members to join as individual plaintiffs in order to vindicate their right to be free from the compelled disclosure of their association with IGP would undermine the very right sought to be protected and render meaningless the purpose for allowing third party standing.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A

United States Court of Appeals

for the Ninth Circuit

No. 01-56900

DANIEL ANDERSEN and LORENZO J. LAMANTIA, individually and on behalf of the members of the Institute of Global Prosperity,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, NAMED and UNNAMED AGENTS of the INTERNAL REVENUE SERVICE CRIMINAL DIVISION,IRS Special Agent THOMAS WOURGIOTIS, IRS Special Agent TOM OENBRINK, IRS Special Agent PAULA LURVEY, IRS Special Agent JEFFREY HOLM, IRS Special Agent JULIE LAU, IRS Special Agent CHARLES PHILLIPS, IRS Special Agent JUDY O'BRIANT and SHOSHANNA SZUCH,

Defendants-Appellees.

April 11, 2002, Argued and Submitted, Pasadena, California

July 30, 2002, Filed

Before: Stephen Reinhardt and Susan P. Graber, Circuit Judges, and

Roger L. Hunt, * District Judge. Opinion by Judge Graber; Dissent by Judge Reinhardt.

* The Honorable Roger L. Hunt, United States District Court for the District of Nevada, sitting by designation.

OPINION:

GRABER, Circuit Judge:

Plaintiffs Andersen and LaMantia, on behalf of themselves and the members of the Institute for Global Prosperity (IGP), sued the United States and its agents. Plaintiffs alleged that the government conspired to violate their constitutional rights and those of IGP's members when the government executed eight search warrants and seized, among other things, IGP's membership lists and literature. Plaintiffs moved for an injunction (1) to prevent the government from conducting further searches or seeking further information, (2) to prevent the government from using the information obtained from search warrants already executed, and (3) to require the government to return the seized property. The district court denied the motion. We dismiss Plaintiffs' appeal for lack of jurisdiction.

FACTS AND PROCEDURAL HISTORY

Plaintiffs are leaders of IGP, an organization that distributes "educational, political, religious and philosophical materials in the form of books and CDs, much of which is critical of the United States' financial and taxing policies." Plaintiffs and other IGP leaders are currently under investigation [1] for tax-

[1] At oral argument, the parties agreed that we should assume for the purpose of decision that there is a grand jury investigation in progress. Although the government makes no factual representations on

related crimes.

Between February 28, 2001, and September 25, 2001, the government executed eight search warrants on Plaintiffs' residences and on IGP offices across the country. The warrants sought a broad range of financial records. The warrants also sought material under the heading "[IGP] related records/evidence," including:

> applications for membership, membership cards, membership agreements, confidentiality agreements, promotional literature (letters, flyers, brochures, videotapes and audiotapes), scripts used during telephone solicitations, newspaper advertisements, lists of names or addresses or telephone numbers (or other identifying data) of members, prospective members or Qualified Retailers, records reflecting attendance at [IGP] seminars, videotapes/audiotapes of [IGP] leaders/members at [IGP] seminars, and audiotapes of [IGP programs].

On September 28, 2001, Plaintiffs filed this action in federal district court, alleging claims of (1) conspiracy to violate Plaintiffs' First and Fourth Amendment rights and the First Amendment rights of members and associates of IGP and (2) "willful, wanton and malicious violations" of Plaintiffs' individual Fourth Amendment rights.

At the same time, Plaintiffs filed a motion for a temporary restraining order and a preliminary injunction. They sought to

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this issue, we so assume. *See* Fed. R. Crim. P. 6(e) (providing for secrecy of grand jury proceedings).

prohibit the United States from

> (a) conducting any further searches and seizures or otherwise seeking or acquiring indicia of association with plaintiffs and/or IGP's members and/or associates; and (b) any use or dissemination to any person, entity or agency whatsoever of any membership and/or associates' identities or information already obtained during the searches and seizures at issue ....

Plaintiffs also sought a permanent injunction ordering the return of all IGP-related property that had been seized pursuant to the warrants.

The district court denied the request for a temporary restraining order and, later, denied Plaintiffs' motion for a preliminary injunction. Plaintiffs timely filed a notice of appeal.

DISCUSSION

As a threshold matter, we must decide whether we have jurisdiction to review the district court's denial of the preliminary injunction. [2] Generally, we may review only final orders of the district court. 28 U.S.C. § 1291.

> The denial of a preliminary injunction is one of the few kinds of appealable interlocutory orders. 28 U.S.C. § 1292(a)(1). However, here, Plaintiffs' motion sought relief

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[2] For jurisdictional purposes, we are obliged to determine the finality of a decision on appeal. *Regula v. Delta Family-Care Disability Survivorship Plan, 266 F.3d 1130, 1136-37 (9th Cir. 2001).* We review *de novo* questions of our jurisdiction. *Didrickson v. United States Dep't of Interior, 982 F.2d 1332, 1337 (9th Cir. 1992).*

> typically provided by Federal Rule of Criminal Procedure 41(e). Although styled as an action for an "injunction," perhaps because of the general rule noted above, the motion *in substance* sought the return of property that had been seized pursuant to a warrant. Rule 41(e) controls the procedure for obtaining that form of relief. The distinction between injunction proceedings in general and Rule 41(e) motions in particular is important, because the denial of a motion under Rule 41(e) usually is not appealable. DiBella v. United States, 369 U.S. 121, 131-32, 7 L. Ed. 2d 614, 82 S. Ct. 654 (1962).

The substance of the motion, not its form, controls its disposition. See Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc., 204 F.3d 867, 880 (9th Cir. 2000) ("The label attached to a motion does not control its substance." (citation and internal quotation marks omitted)); Hasbrouck v. Texaco, Inc., 879 F.2d 632, 635 (9th Cir. 1989) ("The nomenclature the movant uses is not controlling. This court must decide whether a motion, however styled, is appropriate for the relief requested." (citations omitted)). In accordance with that principle favoring substance over form, we have construed a motion that sought injunctive relief of the kind provided by Rule 41(e) as a Rule 41(e) motion, notwithstanding the motion's label. See, *e.g.*, DeMassa v. Nunez, 747 F.2d 1283, 1291 (9th Cir. 1984) (Ferguson, J., dissenting), *reh'g granted on other grounds*, 770 F.2d 1505 (9th Cir. 1985) (per curiam) (DeMassa I and DeMassa II, respectively). Because Plaintiffs sought the relief provided by Rule 41(e), we construe their motion as one properly brought under that rule.

The Supreme Court has held that the courts of appeal have jurisdiction to review decisions on Rule 41(e) motions "only if the motion is solely for return of property and is in no way tied to a criminal prosecution *in esse* against the movant." DiBella, 369

U.S. at 131-32 . [3]n3 As we recently recognized:

> This rule reflects the careful balancing between two competing interests: On the one hand, appellate courts should act to prevent the deprivation of seized property that is sorely needed when those deprived have no other avenues for relief. On the other hand, the appeal of a lower court's decision denying a return of property can add uncertainty and delay to an ongoing parallel criminal proceeding, especially if the legality of the search is the critical issue in the criminal trial.

Bridges v. United States (In re 3021 6th Ave. N.), 237 F.3d 1039, 1041 (9th Cir. 2001).

In this case, Plaintiffs' motion seeks the return of the seized property but also asks for significant additional relief. And, there is an ongoing criminal investigation that targets Plaintiffs. In the circumstances, Plaintiffs fail both parts of DiBella's test, and they therefore cannot establish the exception to the general rule that motions like theirs are unappealable.

As for the first criterion, in addition to demanding the return of their property, Plaintiffs seek to enjoin the IRS from conducting any future searches or seizures. Further, they seek to enjoin the IRS from using the material that already was seized.

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[3] The dissent relies on two brief passages in *DiBella, 369 U.S. at 124-26,* to argue that it "does not set forth an absolute rule prohibiting all interlocutory appeals in cases involving criminal proceedings." Dissent at 10607. In the cited passages, however, the *DiBella* Court was merely describing, as background, extant exceptions to the finality rule, none of which applies here. The Court went on to state the applicable and clear two-part test that we summarize in the text above. *369 U.S. at 131-32.*

By asking for exclusion of evidence and by seeking to prevent any further searches, the complaint seeks relief beyond "solely" the return of property.

As for the second criterion, an ongoing grand jury investigation constitutes a "'criminal prosecution *in esse*'" under DiBella. DeMassa I, 747 F.2d 1283, 1291 (Ferguson, J., dissenting) (quoting DiBella, 369 U.S. at 132). In this circuit, rulings on motions for return of property are unappealable when there is an ongoing grand jury investigation. Id.

Indeed, DeMassa I directly controls this case. [4] In DeMassa I, we construed a motion for a preliminary injunction as a Rule 41(e) motion. Because one of the plaintiffs was the target of an ongoing grand jury investigation, we held that we lacked jurisdiction to review the order denying injunctive relief. See 747

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[4] In *DeMassa I*, we held that we lacked jurisdiction to review the Fourth Amendment claims of a lawyer whose offices had been searched and whose files had been seized. Because that lawyer was the target of an ongoing grand jury investigation, we concluded that *DiBella* controlled, and we had no jurisdiction. *747 F.2d at 1287.* However, in *DeMassa II*, we held that we *did* have jurisdiction to review the Fourth Amendment claims of the clients who were also individually named plaintiffs. *770 F.2d at 1506.* We reasoned that those clients were "strangers to any potential indictments" and, thus, their claims were reviewable under *DiBella* because there was no criminal proceeding *in esse. Id.*

The clients in *DeMassa II* were named plaintiffs in the action. By contrast, the IGP is not a plaintiff, nor are any individual members named as plaintiffs except Andersen and LaMantia. Andersen and LaMantia purportedly assert rights on the membership's behalf. Without jurisdiction over any of Andersen's or LaMantia's claims, however, we cannot assert jurisdiction over the membership's potential *derivative* claims, even if Andersen and LaMantia otherwise would be entitled to bring such claims in a representative capacity.

F.2d at 1287 (stating that "this circuit has joined those courts adopting a liberal definition of when a proceeding is *in esse* and has also concluded that an order denying the return of seized property is not appealable when a grand jury proceeding against the movant is underway").

DeMassa I clearly contemplates that grand jury proceedings constitute criminal proceedings for the purpose of determining appealability. This interpretation is consistent with *DiBella*, which held that "the mere circumstance of a *preindictment* motion does not transmute the ensuing evidentiary ruling into an independent proceeding begetting finality even for purposes of appealability. Presentations before a ... grand jury are parts of the federal prosecutorial system leading to a criminal trial." DiBella, 369 U.S. at 131 (citations omitted) (emphasis added).

Plaintiffs ask for an exception to the rule of nonappealability on the ground that their First Amendment rights allegedly have been infringed. Although DiBella and DeMassa dealt with Fourth Amendment rights, the broad proscription against interlocutory review that those cases establish applies with equal force to First Amendment claims.

We recognize that First Amendment rights may be chilled when the government seizes information about the members of an organization. NAACP v. Alabama, 357 U.S. 449, 462-63, 2 L. Ed. 2d 1488, 78 S. Ct. 1163 (1958). Nonetheless, for three reasons, we conclude that the Supreme Court would apply the DiBella rule even to a First Amendment claim.

First, the Court's logic in DiBella retains its efficacy in this context. The Court gave two reasons for refusing to create an

exception to the general finality rule: The Court was concerned with impeding the criminal justice process, including the Sixth Amendment right to a speedy trial, 369 U.S. at 124, 126, and it concluded that Rule 41(e) motions are not independent of the associated criminal investigation and thus not severable from the "larger litigious process," id. at 127 (citation and internal quotation marks omitted). In other words, permitting an appeal from the district court's decision on a Rule 41(e) motion is likely to affect the integrity of the investigation and potential criminal trial. Id. These concerns are equally valid whatever the specific nature of the constitutional right that the potential criminal defendant seeks to vindicate.

Second, the bar against an interlocutory appeal means only that review on the merits is postponed, not foreclosed. Plaintiffs can obtain appellate review on the merits of their claims when the district court has taken *final* action, either in the context of a criminal conviction or otherwise.

Third, we note by way of analogy the Supreme Court's application of a procedural bar even in the face of substantial First Amendment claims. In United States v. American Friends Service Committee, 419 U.S. 7, 42 L. Ed. 2d 7, 95 S. Ct. 13 (1974) (per curiam), the Supreme Court reversed an injunction that had been granted on First Amendment grounds. Employees of the American Friends Service Committee, who were Quakers, obtained an injunction that prevented the government from enforcing mandatory tax-withholding requirements. Id. at 9. Because of their religious objection to the war in Vietnam, the employees contended that the Free Exercise Clause protected their right to express those beliefs by refusing to pay a portion of their taxes. Id. at 7-8 . Despite the strong First Amendment interests at stake, the Court imposed a statutory bar against

equitable relief. Construing the Anti-Injunction Act, 26 U.S.C. § 7421(a), [5] the Court reaffirmed the principle that "the constitutional nature of a taxpayer's claim" under the First Amendment was irrelevant to its analysis. Am. Friends, 419 U.S. at 11 (citation and internal quotation marks omitted).

We express no opinion on whether the Anti-Injunction Act would bar Plaintiffs' suit on the merits; it is not clear whether it would or would not. See Church of Scientology v. United States, 920 F.2d 1481, 1486 (9th Cir. 1990) (noting that the Act extends to suits that target any activity that is "'intended to or may culminate in the assessment or collection of taxes'" (quoting Blech v. United States, 595 F.2d 462, 466 (9th Cir. 1979))). However, analogizing from American Friends, we conclude that no exception to the procedural bar may be made here on the ground that Plaintiffs assert First Amendment as well as Fourth Amendment interests.

Although the dissent emphasizes the compelling nature of First Amendment claims, our jurisdiction is bounded by the clear rule in *DiBella*, as interpreted by this court in DeMassa. We are not free to ignore those precedents defining our jurisdiction simply because the subject matter of the underlying complaint tempts us to do so. That is true even in the Younger abstention context, on which the dissent relies by analogy. See Younger v. Harris, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971)

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[5] Subject to certain statutory exceptions not applicable here, the Anti-Injunction Act provides that [HN10] "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." *26 U.S.C. § 7421*(a).

(limiting Dombroski v. Pfister, 380 U.S. 479, 14 L. Ed. 2d 22, 85 S. Ct. 1116 (1965), to its facts and abstaining despite an underlying First Amendment claim).

CONCLUSION

Plaintiffs' motion for a preliminary injunction was, in substance, a motion for return of property under Federal Rule of Criminal Procedure 41(e), but it sought additional relief and was tied to an ongoing grand jury investigation. Therefore, the district court's order denying the injunction is not a final, appealable order, and we lack jurisdiction to review it.

APPEAL DISMISSED.

DISSENT:

REINHARDT, Circuit Judge, dissenting:

The majority asserts that it merely applies the clear rule of DiBella and DeMassa to the case at hand. The rule is hardly clear and in my view is not applicable to claims of serious, imminent, and irreparable violations of First Amendment rights. Accordingly, I dissent.

The majority treats the appellants' motion as simply a "functional" 41(e) motion that, under the law of our circuit, is tied to an ongoing criminal proceeding and thus is unappealable. In so doing, the majority fails to consider adequately the nature and importance of the subject matter of the appellants' motion. The appellants seek to enjoin the government from seizing and making use of their membership lists -- lists of the names and other identifying information regarding all current and

prospective members of the Institute for Global Prosperity (IGP).

Membership lists have a long and unique history in our constitutional jurisprudence, and the seizure of such items implicates the rights of freedom of association and freedom of speech under the First Amendment. In NAACP v. Alabama, 357 U.S. 449, 2 L. Ed. 2d 1488, 78 S. Ct. 1163 (1958), the government action at issue, as in this case, was the compelled disclosure of the organization's membership lists. Id. at 460. The Court stated that "it is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] effective ... restraint on freedom of association." Id. Thus, the Court recognized that the destruction of members' anonymity may hamper their individual rights to associate freely. See Gibson v. Fla. Legislative Investigation Comm., 372 U.S. 539, 544, 9 L. Ed. 2d 929, 83 S. Ct. 889 (1963) (stating that right of association includes protection of privacy of association); NAACP, 357 U.S. at 462 ("This Court has recognized the vital relationship between freedom to associate and privacy in one's associations.").

The concern for the protection of the right of free association, and the ability to maintain one's privacy in that association, is especially present in political, economic, and religious organizations, *NAACP, 357 U.S. at 460,* including tax protester groups. First Nat'l Bank v. United States, 701 F.2d 115, 118 (10th Cir. 1983) ("The chilling effect of a summons served by an IRS agent to obtain membership records of a tax protester group ...[is] readily apparent.") (internal quotation marks omitted). It is especially important that we be vigilant in our protection "when a group espouses dissident beliefs." NAACP, 357 U.S. at 462. Accordingly, a government action that directly, or indirectly, limits the freedom to associate "is subject to the

closest scrutiny." Id. at 461; see also Bates v. Little Rock, 361 U.S. 516, 523, 4 L. Ed. 2d 480, 80 S. Ct. 412 (1960) (stating that associational rights are protected "from being stifled by more subtle governmental interference").

Here, the appellants, who head a tax protester organization, assert their rights to association and freedom of speech -- rights that we must be particularly vigilant to protect against unwarranted governmental intrusion. They allege that those rights are currently being violated, that there will be additional violations in the near future, and that the government's actions, if unreviewed by this court, will have an immediate and serious chilling effect upon the organization and its members. The only question addressed in the majority opinion, and in this dissent, is whether we have the ability to consider appellants' constitutional claims now, or whether they must await appellate review for an indefinite period of time, perhaps for a significant number of years, by which time the irreparable damage that is attendant on the alleged First Amendment violation will likely have been done. The majority concludes that "later" -- no matter how much later -- is good enough. I disagree.

As stated by the majority, DiBella and DeMassa together stand for the proposition that a motion for the return of property is generally not appealable on an interlocutory basis if it is tied to a "criminal prosecution *in esse* against the movant." DiBella v. United States, 369 U.S. 121, 132, 7 L. Ed. 2d 614, 82 S. Ct. 654 (1962); see also DeMassa v. Nunez, 747 F.2d 1283, 1287 (9th Cir. 1984). The stated purpose behind this rule is to avoid interference with ongoing criminal cases, as well as to discourage piecemeal litigation and delays in the administration of justice. DiBella, 369 U.S. at 124.

The majority asserts that its decision is compelled by DiBella, as interpreted by DiMassa. I disagree. Neither DiBella nor DeMassa addressed the First Amendment, and neither case involved membership lists. Nor did the petitioner in either case seek an injunction to prevent the further seizure of First Amendment materials, as do the appellants here. To the contrary, both DiBella and DeMassa involved petitioners who instituted collateral civil proceedings to assert violations of their Fourth Amendment rights resulting from searches and seizures of drugs and related materials and stolen property, as well as a gun and devices used in a robbery. See DiBella, 369 U.S. at 122 and 290 F.2d 166, 167 n. 1 (5th Cir. 1961); DeMassa, 747 F.2d at 1285 (also asserting Fifth and Sixth Amendment). The Supreme Court and this court have said that because Fourth Amendment questions arise regularly in criminal trials and because their resolution may determine the outcome of the criminal matter, they represent "but a step in the criminal case" and should ordinarily be resolved in the course of the criminal proceedings. DiBella, 369 U.S. at 131-32; DeMassa, 747 F.2d at 1288. While I agree that this general principle ordinarily holds true for claims of Fourth Amendment violations, I do not agree that it is applicable to bona fide First Amendment claims, including claims involving past and future seizures of membership lists and similar constitutionally protected materials.

DiBella and DeMassa do not set forth an absolute rule prohibiting all interlocutory appeals in cases involving criminal proceedings. In DiBella, the Court stated that Congress intended such appeals should be permitted where the harm of "error unreviewed before the judgment is definitive and complete [is] greater than the disruption caused by immediate appeal." *Id.* (internal citation omitted). The Court also stated that "immediate appeal has been allowed from an order recognized as collateral to

the principal litigation ... when the practical effect of the order will be irreparable by any subsequent appeal." 369 U.S. at 126 (internal citation omitted). These exceptions fit within a general public policy permitting interlocutory appeals in criminal cases where rights of exceptional importance are at stake, and where resolution of those rights cannot wait until the close of criminal proceedings. See, *e.g.*, Helstoski v. Meanor, 442 U.S. 500, 61 L. Ed. 2d 30, 99 S. Ct. 2445 (1979) (permitting immediate appeal of criminal defendant's motion to dismiss under the Speech or Debate Clause); Abney v. United States, 431 U.S. 651, 52 L. Ed. 2d 651, 97 S. Ct. 2034 (1977) (permitting immediate appeal of criminal defendant's motion to dismiss on double jeopardy grounds); Stack v. Boyle, 342 U.S. 1, 96 L. Ed. 3, 72 S. Ct. 1 (1951) (permitting immediate appeal of criminal defendant's motion to reduce bail); see also 18 U.S.C. § 3731 (permitting prosecution to appeal immediately order dismissing indictment, granting motion to suppress, or granting motion for return of property). In my view, the First Amendment right to association is one of those questions of exceptional importance that must be resolved as soon as possible, without waiting for the end of what may be interminable criminal proceedings. See Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 55, 103 L. Ed. 2d 34, 109 S. Ct. 916 (1992) ("Adjudicating the proper scope of First Amendment protections has often been recognized by this Court as a 'federal policy' that merits application of an exception to the general finality rule."); United States v. P.H.E., Inc., 965 F.2d 848, 857 (10th Cir. 1992) ("Federal courts have asserted jurisdiction in a number of contexts involving non-final orders, in which the proceedings complained of infringed upon First Amendment rights").

In this case, the "criminal proceeding" is the beginning of

a grand jury investigation. [1] At that stage of the proceedings, there is no certainty that a criminal indictment will ever issue, and even if probability weighs in favor of an indictment issuing eventually, there is no telling how long that might take. The target of a grand jury investigation may have to wait a fair number of years before he will have the chance to raise his First Amendment claims and, under the majority's holding, he will be unable during that entire time to take any legal action to prevent the continuing violation of his rights. In my view, an immediate appeal is necessary to afford the appellants a forum in which to assert their First Amendment rights before irreparable injury results.

The Supreme Court has held that when the government seizes material that is protected by the First Amendment, courts must provide increased oversight to ensure that First Amendment rights are not harmed. See New York v. P.J. Video, 475 U.S. 868, 873, 89 L. Ed. 2d 871, 106 S. Ct. 1610 (1986). For example, a seizure of obscene materials cannot stand absent a warrant and a prompt post-seizure judicial determination of its legality. Id., citing Lee Art Theatre, Inc. v. Virginia, 392 U.S. 636, 20 L. Ed.

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[1] As the majority states, under Ninth Circuit law, a criminal proceeding is *in esse* once a grand jury investigation has begun. *DeMassa, 747 F.2d at 1287.* The Sixth, Seventh, Eighth, and Tenth Circuits take a different position, although the Second, Third, and Fourth Circuits share our view. The circuits that disagree with us require charges to be filed before a criminal proceeding is deemed "pending." *See Blinder, Robinson & Co. v. United States, 897 F.2d 1549, 1554 (10th Cir. 1990); In re Grand Jury Proceedings, 716 F.2d 493, 496 (8th Cir. 1983); Sovereign News Co. v. United States, 690 F.2d 569, 571 (6th Cir. 1982); Mr. Lucky Messenger Serv., Inc. v. United States, 587 F.2d 15, 16 (7th Cir. 1978). But see United States v. Regional Consulting Serv., 766 F.2d 870 (4th Cir. 1984); United States v. Furina, 707 F.2d 82 (3d Cir. 1983); Standard Drywall, Inc. v. United States, 668 F.2d 156 (2d Cir. 1982).*

2d 1313, 88 S. Ct. 2103 (1968). In keeping with this idea, circuit courts have held that federal courts may exercise their equitable jurisdiction in favor of a potential defendant, who has not yet been indicted and who alleges First Amendment violations, because "the promise of review of a prior restraint at some indefinite, future time does not meet constitutional requirements." Kitty's East v. United States, 905 F.2d 1367, 1372 (10th Cir. 1990).

In the related Younger abstention context, the Supreme Court has held that the exercise of federal jurisdiction may be appropriate if a violation of First Amendment rights is alleged, even though under normal circumstances it would not be. See Dombrowski v. Pfister, 380 U.S. 479, 489-90, 14 L. Ed. 2d 22, 85 S. Ct. 1116 (1965) (stating that abstention is inappropriate in cases where the threat of criminal prosecution itself chills freedom of expression). This is because sometimes First Amendment rights cannot adequately be addressed in the state criminal proceeding. 380 U.S. at 490-91; see also Kaylor v. Fields, 661 F.2d 1177, 1182 (8th Cir. 1981) (finding Younger abstention inappropriate as there was "no assurance that [plaintiff] could assert this free speech claim as a defense to the crime ... with which she is charged"); Gold v. State of Connecticut, 531 F.2d 91 (2d Cir. 1976) (per curiam) (stating in Younger abstention context that "federal review may be available where such orders affect First Amendment rights not capable of vindication through direct appeal from conviction"), citing Gerstein v. Pugh, 420 U.S. 103, 108 n. 9, 43 L. Ed. 2d 54, 95 S. Ct. 854 (1975). [2] Here, the exercise of appellate jurisdiction is

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[2]In *World Famous Drinking Emporium v. City of Tempe, 820 F.2d 1079, 1082 (9th Cir. 1987),* this circuit held that the petitioner's First Amendment challenge under § 1983 was barred by *Younger*. However, in

justified for similar reasons.

United States v. American Friends Service Committee, 419 U.S. 7, 42 L. Ed. 2d 7, 95 S. Ct. 13 (1974), the only First Amendment case on which the majority relies, does not alter the analysis in our case. Nowhere does American Friends discuss the First Amendment. Nor does it address an appellate court's jurisdiction to hear an interlocutory appeal. American Friends simply stands for the proposition that constitutional claims do not constitute exceptions to the Anti-Injunction Act. Id. at 15. The question before us, of course, is not whether the Anti-Injunction Act bars appellants' First Amendment claims (and I think it likely does not), but whether we have jurisdiction to decide on this appeal whether it does, or whether Appellants' claims should be rejected on other grounds. On that jurisdictional question, I believe that First Amendment principles are controlling.

Appellants have alleged that their First Amendment associational rights, and those of IGP's members, have been and are currently being chilled by the government's continuing possession of IGP's membership lists. In my view, the importance of this claim -- and the need to resolve it expeditiously -- outweighs any theoretical disruption to the grand jury proceedings that may be occasioned by an immediate appeal. I would hold that this is the kind of claim contemplated by DiBella's exceptions, and therefore that we have jurisdiction to review it. I respectfully dissent from the majority's decision to dismiss the appeal.

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that case the plaintiffs were also defendants in state court criminal and civil enforcement proceedings, so they had ample opportunity to raise their First Amendment challenge in the ongoing state court proceedings. Here, by contrast, no indictment has issued against Appellants.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MINUTE ORDER

Case No.: CV-01-08427 CAS (FMOx) October 22, 2001

DANIEL ANDERS0N [sic] AND LORENZO J. LAMANTIA, INDIVIDUALLY AND ON BEHALF OF THE MEMBERS OF THE INSTITUTE FOR [sic] GLOBAL PROSPERITY V. UNITED STATES OF AMERICA, ET AL.

PRESIDING: HONORABLE CHRISTINA A. SNYDER

PROCEEDINGS: PLAINTIFF'S [sic] APPLICATION FOR A PRELIMINARY INJUNCTION (Filed September 28, 2001)

The court finds plaintiff's [sic] motion appropriate for decision without oral argument. Fed. R. Civ. P. 78; Local Rule 7-15. Accordingly, the hearing date of October 22, 2001, is hereby vacated and the matter is taken under submission.[1]

In the present motion, plaintiffs Daniel Anderson [sic] and Lorenzo J. LaMantia, individually and on behalf of the members of the Institute of Global Prosperity ("IGP"), seek a preliminary

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[1] On October 10, 2001, plaintiffs served defendant IRS Special Agent Paula Lurvey with a subpoena to appear at the October 22, 2001 hearing. On October 16, 2001, defendant filed a motion to quash the subpoena. Pursuant to Local Rule 7-6, factual contentions involved in any motion shall be determined on written evidence alone, unless the Court, in its discretion, requires or allows oral examination. In the instant case, the Court declines to hear oral testimony regarding the preliminary injunction, and, as a result, grants defendant's motion to quash the subpoena.

injunction against the federal government, special agents of the Internal Revenue Service ("IGP"), and alleged informant Shoshanna Szuch. At issue are actions allegedly taken by the IRS agents in the course of executing search warrants at plaintiffs' homes and other locations as part of a criminal investigation.

On September 28, 2001, plaintiffs filed a complaint alleging claims for: (1) conspiracy to violate Anderson's [sic] and LaMantia's First and Fourth Amendment rights and the First Amendment rights of members and associates of the IGP; and (2) "willful, wanton and malicious violations" of Anderson's [sic] and LaMantia's Fourth Amendment rights. Complaint. Paras. 90, 91. Concurrently with the filing of the complaint, plaintiffs filed the instant application for a temporary restraining order and preliminary injunction: (1) prohibiting the United States and its agents from conducting any further searches and seizures or otherwise seeking information relating to those associated with the IGP; (2) prohibiting the United States and its agents from using, in any manner, any information obtained from the execution of prior search warrants relating to IGP; and (3) ordering defendants to return all previously seized items and information. Motion for Preliminary Injunction ("Mot.") at 8. On October 1, 2001, the Court denied the motion for a temporary restraining order.

I. BACKGROUND

Anderson [sic] and LaMantia are leaders of the IGP, an association which engages in the "distribution of educational, political, religious and philosophical materials in the form of books and CDs, much of which is critical of the United States' financial and taxing policies." Mot. at para. 2. Anderson [sic], LaMantia, and other IGP leaders are the subject of an ongoing federal criminal investigation relating to whether the IGP and its

leaders have conspired to commit tax offenses and/or defraud the IRS, committed or attempted to commit tax evasion, failed to file tax returns, and interfered with the administration of the Internal Revenue laws. Opposition to Motion for Preliminary Injunction ("Opp. Mot.") at 3-4; Stokes Dec. at paras. 2,3. The matters which give rise to the complaint are actions allegedly taken by defendants in the course of executing search warrants: (1) on February 28, 2001, at Anderson's [sic] residence in Oxnard, California; at LaMantia's residence in Mountain Ranch, California; and at the residence of David Struckman, another IGP leader, in Issaquah, Washington; (2) on August 23, 2001, at the IGP offices in Marlborough, Massachusetts; at the residence of Daniel Walper, a computer programmer who has worked for IGP, in Pensacola; and at the residence of Claudia Wirmer in Fort Walton Beach, Florida; and (3) on September 25, 2001, at Vulcan Information Packaging, a company which manufactures and ships IGP educational materials to customers, in Vincent, Alabama.

Plaintiffs argue that injunctive relief is necessary to prevent irreparable injury prior to the resolution of the case on the merits. Mot. At paras. 15,16. Defendants assert that injunctive relief is inappropriate for several reasons: (1) plaintiffs lack standing to move for injunctive relief on behalf of the membership of the IGP; (2) plaintiffs Anderson [sic] and LaMantia have failed to allege that their constitutional rights have been violated; (3) plaintiffs will not suffer irreparable injury if injunctive relief is not granted; and (4) the Court is barred from enjoining the assessment or collection of any tax by the anti-injunction provision of 26 U.S.C. § 7421.

II. STANDARD FOR A PRELIMINARY INJUNCTION

A preliminary injunction is appropriate when the moving party shows either (1) a combination of probable success on the

merits and the possibility of irreparable harm, or (2) the existence of serious questions going to the merits and that the balance of hardships tips sharply in the moving party's favor. See Rodeo Collection, Ltd. v. West Seventh, 812 F.2d 1215, 1217 (9th Cir. 1987). These are not two distinct tests, but rather "the opposite ends of a single 'continuum in which the required showing of harm varies inversely with the required showing of meritoriousness.'" Id. A "serious question" is one on which the movant 'has a fair chance of success on the merits." Sierra On-Line, Inc. v. Phoenix Software, Inc., 739 F. 2d 1419, 1421 (9th Cir. 1984).

III. DISCUSSION

Plaintiffs allege that defendants' conduct has violated plaintiffs' First, Fourth, and Fifth Amendment rights,[2] and that, if not enjoined, defendants' conduct will further infringe upon these rights.[3] As indicated above, plaintiffs must show probable

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[2] Plaintiffs' complaint and motion for preliminary injunction alleges violations of their First and Fourth Amendment rights, while plaintiffs' memorandum in support of motion for preliminary injunction alleges violations of their First and Fifth Amendment rights. For present purposes, the Court will assume plaintiffs are alleging violations of their First, Fourth, and Fifth Amendment rights.

[3] Defendants assert that Anderson [sic] and LaMantia lack standing to assert claims for injunctive relief on behalf of members, employees, and associates of the IGP. See Mot. at 6. However, the Court finds that plaintiffs do have standing to assert constitutional claims on behalf of members of the IGP based on the "close relationship" which exists plaintiffs and the other members of the IGP. See Craig v. Boren, 429 U.S. 179 (1976); Lepelletier v. Federal Deposit Ins. Corp., 164 F.3d 37, 43 (D.C. Cir. 1999) (requirement of close relationship serves to insure that there is "an identity of interests between the parties such that the plaintiff will act as an effective advocate of the third party's interests.")

success on the merits and the possibility of irreparable harm or, alternatively, the existence of serious questions going to the merits and that the balance of hardships tips sharply in their favor.

"A party invoking equitable intervention in the criminal investigative process has a particularly heavy burden. Only the most extraordinary circumstances warrant anticipatory judicial involvement in criminal investigations." Reporters Committee for Freedom of the Press v. American Tel. & Tel. Co., 593 F. 2d 1030, 1065 (D.C. Cir. 1978) (denying injunctive relief to plaintiff journalists against government subpoenas to obtain telephone billing records). Similarly, the Ninth Circuit has held that "only in extraordinary circumstances would we entertain an action to enjoin a prosecutor's investigative activities." Olaques v. Russoniello, 7709 F.2d 791, 799-800 (9th Cir. 1985) (refusing to issue an injunction against an investigation by the United States Attorney into possible violations of the Voting Rights Act). This prohibition against judicial involvement in prosecutorial matters is based on the doctrine of separation of powers. See Reporters Committee, 593 F.2d at 1065 ("The balance between the Executive and Judicial branches would be profoundly upset if the Judiciary assumed superintendence over the law enforcement activities of the Executive branch . ..."); United States v. Chanen, 549 F.2d 1306, 1313 (9th Cir. 1977) (a court may not exercise its 'supervisory power' in a way which encroaches on the prerogatives of [a prosecutor] unless there is a clear basis in fact and law for doing so" because of separation of powers constraints).

In the instant case, plaintiffs seek to enjoin defendants from conducting further, searches as a part of their criminal investigation of plaintiffs' activity. The thrust of plaintiffs' argument appears to be that defendants' actions are aimed at

curbing plaintiffs' speech and other activities protected by the First Amendment. See Memorandum in Support of Motion for Preliminary Injunction at 7. However, plaintiffs fail to articulate how a criminal investigation of their tax activities burdens their First Amendment rights, other than vague allegations that defendants' actions are 'calculated to coerce plaintiffs to cease distribution of constitutionally protected speech and to chill protected First Amendment activities." Mot. at para. 3. Plaintiffs appear to be alleging that defendants have attempted to stifle plaintiffs' speech, by seizing "books and other materials [published by the IGP] for the ideas they contained" in the course of executing the warrants, and by attempting to shut down IGP's distribution of this literature to the public.[4] In addition, plaintiffs allege that defendants' actions have had the effect of infringing on their freedom of association. See Mot. at para 17 ("Searches and seizures motived by a desire to chill association . . . protected by the First Amendment [are] barred and must be enjoined.") However, even if true, defendants' alleged behavior fails to rise to the level of "extraordinary circumstances" necessary for plaintiffs be granted injunctive relief.

Assuming arguendo that defendants' actions did infringe on plaintiffs' First Amendment rights, "[t]here are governmental interests sufficiently important to outweigh the possibility of infringement . . . ." Buckley v. Valeo, 434 U.S. 1, 66 (1976). The government can take actions inhibiting First Amendment activities when it can demonstrate that such actions have a 'substantial relation" to a compelling interest. Id. at 64. The case at hand clearly implicates the government's compelling interest in investigations into possible criminal violations of the tax laws.

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[4] Plaintiffs cite as evidence of defendants' actions the fact that since February 28, 2001, IGP's sales have dropped approximately 60%. Mot. at para. 15.

The parties do not attempt to balance the hardships or describe what irreparable injury will occur if the injunction does not enter. However, even if it could be said that the moving parties will suffer irreparable injury, it is not the type of irreparable harm that would warrant intervention in an ongoing criminal prosecution in light of the standard set forth above.

On the record before the Court, it appears that defendants' alleged conduct fails to rise to the level necessary to merit judicial intervention in an ongoing criminal investigation. In addition, the alleged infringement of First Amendment rights alleged by plaintiffs appears to be outweighed by the government's compelling interest in pursuing criminal investigations against persons who unlawfully fail to pay taxes. Therefore, plaintiffs have demonstrated neither a combination of probable success on the merits and the possibility of cognizable irreparable har, or the existence of serious questions going to the merits and that the balance of hardships tips in their favor. Therefore, plaintiff's [sic] motion for a preliminary injunction is

DENIED.

IT IS SO ORDERED.

United States Court of Appeals

for the Ninth Circuit

No. 01-56900

DANIEL ANDERSEN and LORENZO J. LAMANTIA, individually and on behalf of the members of the Institute of Global Prosperity,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, NAMED and UNNAMED AGENTS of the INTERNAL REVENUE SERVICE CRIMINAL DIVISION,IRS Special Agent THOMAS WOURGIOTIS, IRS Special Agent TOM OENBRINK, IRS Special Agent PAULA LURVEY, IRS Special Agent JEFFREY HOLM, IRS Special Agent JULIE LAU, IRS Special Agent CHARLES PHILLIPS, IRS Special Agent JUDY O'BRIANT and SHOSHANNA SZUCH,

Defendants--Appellees.

ORDER

Before: REINHARDT and GRABER, Circuit Judges, and HUNT, District Judge.

Judges Graber and Hunt have voted to deny the petition for rehearing. Judge Reinhardt has voted to grant the petition for

rehearing. Judges Reinhardt and Graber have voted to deny the petition for rehearing en banc, and Judge Hunt has so recommended.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it.

The petition for rehearing and petition for rehearing en banc are DENIED.